

5/22/93

SUBJECT: Water commission authority to regulate underground water quality

COMMITTEE: Natural Resources — favorable, without amendment

VOTE: 7 ayes — Counts, Harris, Bosse, Hochberg, Nieto, Puente, Turner

0 nays

4 absent — Combs, Greenberg, Lewis, Yost

SENATE VOTE: On final passage, April 28 — 31-0

WITNESSES: For — None

Against — None

On — Rebecca Herra, Texas Water Commission

BACKGROUND: Chapter 11 of the Water Code authorizes the Texas Water Commission (TWC) the authority to regulate all types of surface water, including "rivers, streams, lakes, bays, stormwater, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state."

Water Code sec. 52.002 defines "underground water" as water percolating below the surface of the earth that is suitable for agricultural, gardening, domestic, or stock raising purposes, but does not include defined subterranean streams or the underflow of rivers."

In 1904 the Supreme Court adopted the common law rule for groundwater, finding that water percolating underneath the soil is the property of the owner of the surface. A number of subsequent state cases, including *Pecos County Water Control and Improvement District No. 1 v. Williams* in 1954 and *A.H. Dennis III v. Kickapoo Land Company* in 1989, continued this line of reasoning, finding that whereas the state may control surface water and subterranean streams, landowners own percolating and underground water found underneath their property. Under the common law and the 1927 Texas case *Texas Co. v. Burkett*, underground water

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would qualify as a subterranean stream if it had all of the characteristics of surface water, such as a defined bed, banks forming a channel and a current of water.

The Edwards Aquifer is an 180-mile long underground water conduit underlying eight Texas counties: Atascosa, Bexar, Comal, Guadalupe, Hays, Kinney, Medina and Uvalde. The aquifer is the sole source of water for the City of San Antonio and provides irrigation water for many area farmers. In April 1992, TWC declared the Edwards Aquifer an "underground stream" and, as such, found the water to belong to the state and subject to commission regulation. TWC immediately adopted emergency rules and a moratorium on new wells tapping the aquifer. These rules were overturned in state court, in *Texas Farm Bureau, Cattleranchers Association, et al. v the Texas Water Commission*. The case is being appealed.

Water Code sec. 28.011 requires TWC to make and enforce rules for conserving, protecting, preserving and distributing underground, subterranean and percolating water.

DIGEST: SB 1334 would amend Water Code sec. 28.011 to restrict TWC's rulemaking authority over underground water to preserving water *quality*, except as otherwise provided in the code. The commission would be allowed, rather than required, to make and enforce rules dealing with underground water quality.

SUPPORTERS SAY: In its current form, Water Code sec. 28.011 has been confusing to state officials and to the courts attempting to determine its precise meaning. The common law right of capture is deeply embedded in Texas legal tradition protecting underground water. There is little reason to believe that this section of the Water Code was created to overturn that firmly entrenched tradition. The grant of authority under the statute is so broad that until recently it was considered an unconstitutional delegation of legislative authority because no standards were provided for the water commission to promulgate rules.

To clarify legislative intent, SB 1334 would remove all of the superfluous language in sec. 28.011, leaving behind its true objective: protecting groundwater quality.

SB 1334 is intended to further protect landowners' rights to underground water — rights guaranteed both judicially and legislatively. Because an attempt to regulate underground water is an unjustified "taking" of property without compensation, this bill would safeguard landowners from potentially indefensible state actions, such as the water commission's ill-fated attempt to take over the Edwards Aquifer by declaring it an underground stream.

Water districts created under Water Code Chapter 52 have traditionally been the entities to regulate and distribute state water. By clearly removing TWC authority in this area, SB 1334 would eliminate the current overlap and confusion regarding water district authority.

SB 1334 would not have any impact on TWC's authority to protect groundwater *quality* in the recharge and drainage zones of the Edwards Aquifer, but would simply clarify that state law should not be construed as authorizing the commission to control the quantity of groundwater used.

OPPONENTS
SAY:

As the statewide regulatory body for water issues, TWC needs to retain authority to regulate underground water as necessary. To date the commission has not abused the privilege and there is no reason to believe it would do so in the future. If the Legislature fails to take steps toward regulating the Edwards Aquifer, however, the commission, in a last-ditch effort to thwart a threatened federal takeover of the aquifer, may need to redesignate the Edwards Aquifer as an underground stream and enforce regulations controlling it. Approval of this bill before the Legislature has acted on the proposal to regulate the aquifer would be premature and would effectively cut off the state's last resort.

NOTES:

SB 1477 by Armbrister, which would regulate the Edwards Aquifer, is also on the calendar today.